

1-1-2008

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## Recommended Citation

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The Forgotten Wisdom of Justice Stewart's Alternative Approach in the Reapportionment Cases  
by  
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Submitted in partial fulfillment of the requirements of the  
King Scholar Program  
Michigan State University College of Law  
under the direction of  
Prof. Michael A. Lawrence  
Spring, 2008

Not long after beginning law school, law students learn the hierarchy of judicial opinions and how to perform the triage necessary to efficient understanding of the state of the law.<sup>1</sup> There's the gold standard: the law-making majority opinion. Those interested in reading for comprehension wisely also read dissenting opinions, which always put the majority's reasoning to the test and sometimes point out apparently material facts glossed over by the majority. Lower down the pragmatic student's hierarchy of opinions is the concurring opinion (although there are exceptions<sup>2</sup>) and its cousin, the opinion concurring in the judgment.<sup>3</sup> There is even the occasional "Statement" filed, in which a Justice does not address the merits of the legal arguments of the majority opinion, but instead makes a point regarding something such as the case's procedural posture.<sup>4</sup>

These possibilities are familiar to the regular reader of judicial opinions; indeed, it would seem that they exhaust the options. However, an alternative exists. In 1964, the Supreme Court decided a famous package of legislative apportionment cases challenging the apportionments of the State Legislatures of Alabama,<sup>5</sup> New York,<sup>6</sup> Maryland,<sup>7</sup> Virginia,<sup>8</sup> Delaware,<sup>9</sup> and

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<sup>1</sup> Note that this discussion does not mention another alternative: the hoary seriatim opinion. *E.g.*, *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 469 (1793) (Jay, C.J.), *superseded by constitutional amendment*, U.S. CONST. amend. XI, *as recognized in* *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378 (1798), *and recognized as wrongly decided*, *Hans v. Louisiana*, 134 U.S. 1 (1890).

<sup>2</sup> *See, e.g.*, *Medellín v. Texas*, 128 S. Ct. 1346, 1368 (2008) ("Justice Jackson's familiar tripartite scheme provides the accepted framework for evaluating executive action in this area." (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring))).

<sup>3</sup> When these truly matter, it often takes a legal academic to mediate between the Court and the legal profession at large to make sense of them anyway. *See, e.g.*, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992). It is entirely possible this opinion is still not fully understood 16 years later.

<sup>4</sup> *See, e.g.*, *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992) (Souter, J.) (arguing that certiorari had been improvidently granted).

<sup>5</sup> *Reynolds v. Sims*, 377 U.S. 533 (1964).

<sup>6</sup> *WMCA, Inc. v. Lomenzo*, 377 U.S. 633 (1964).

<sup>7</sup> *Md. Comm. for Fair Representation v. Tawes*, 377 U.S. 656 (1964).

<sup>8</sup> *Davis v. Mann*, 377 U.S. 678 (1964).

<sup>9</sup> *Roman v. Sincock*, 377 U.S. 695 (1964).

Colorado.<sup>10</sup> The upshot of these decisions<sup>11</sup> was that state legislatures must be apportioned entirely on a population basis.<sup>12</sup> All six of these cases had a separate majority opinion written by Chief Justice Warren. Justice Harlan filed a single dissenting opinion that applied to all six.<sup>13</sup> Justice Stewart filed his own dissenting opinion, applying to two of the cases.<sup>14</sup> But, in the other four cases, Justice Stewart filed the rare opinion styled as nothing at all: merely his name, followed by some text.<sup>15</sup> They were quite short: no more than 2 paragraphs, each noting that he voted as he did for the reasons stated in his dissenting opinion, notwithstanding the fact that his dissenting opinion only discussed the two cases he dissented in. Curiously, one of them was a dissent, even though it wasn't styled as one!<sup>16</sup>

Since Justice Stewart did not say so directly, it is only in comparing the cases in which he chose to dissent and those he did not that we can see what it is that he was getting at, what his

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<sup>10</sup> *Lucas v. Forty-Fourth Gen. Assembly*, 377 U.S. 713 (1964).

<sup>11</sup> Several more cases from other States were decided via memorandum opinion a few days later which further made the point clear. *See Hill v. Davis*, 378 U.S. 565 (mem.) (1964), *aff'g* *Davis v. Synhorst*, 225 F. Supp. 689 (S.D. Iowa 1964), *and* 217 F. Supp. 492 (S.D. Iowa 1963); *Pinney v. Butterworth*, 378 U.S. 564 (mem.), *aff'g* *Butterworth v. Dempsey*, 229 F. Supp. 754 (D. Conn. 1964); *Hearne v. Smylie*, 378 U.S. 563 (mem.), *rev'g* 225 F. Supp. 645 (D. Idaho 1964); *Marshall v. Hare*, 378 U.S. 561 (mem.), *rev'g* 227 F. Supp. 989 (E.D. Mich. 1964); *Germano v. Kerner*, 378 U.S. 559 (1964) (mem.), *rev'g* 220 F. Supp. 230 (N.D. Ill. 1963); *Williams v. Moss*, 378 U.S. 558 (1964) (mem.), *aff'g* *Moss v. Burkhardt*, 220 F. Supp. 149 (W.D. Okla. 1963); *Nolan v. Rhodes*, 378 U.S. 556 (1964) (mem.), *rev'g* 218 F. Supp. 953 (S.D. Ohio 1963); *Meyers v. Thigpen*, 378 U.S. 554 (1964) (mem.), *aff'g* 211 F. Supp. 826 (W.D. Wash. 1962); *Swann v. Adams*, 378 U.S. 553 (1964) (mem.), *rev'g* *Sobel v. Adams*, 214 F. Supp. 811 (S.D. Fla. 1963).

<sup>12</sup> This is a generalization. The courts have tolerated more deviation in state legislative apportionment than congressional apportionment, notwithstanding that both are to be apportioned on a population basis. *Compare Karcher v. Daggett*, 462 U.S. 725 (1983) (establishing a rule of very strict population equality between districts within a state by invalidating a New Jersey congressional apportionment plan where a perfectly average-sized district size was 526,059 and the difference between the largest and smallest districts was 3,674 when competing plans existed with a maximum deviation of only 2,375), *with Mahan v. Howell*, 410 U.S. 315 (1973) (distinguishing between the Equal Protection Clause's command of equal population in state legislative districting and Article I's requirement that Representatives be elected by "the People" to uphold a Virginia state legislative apportionment with a maximum percentage deviation from the ideal district size of 16.4%).

<sup>13</sup> *Reynolds*, 377 U.S. at 589 & n.\* (Harlan, J., dissenting).

<sup>14</sup> *Lucas*, 377 U.S. at 744 & n.\* (Stewart, J., dissenting).

<sup>15</sup> *Roman*, 377 U.S. at 712 (Stewart, J.); *Davis*, 377 U.S. at 693 (Stewart, J.); *Tawes*, 377 U.S. at 676 (Stewart, J.); *Reynolds*, 377 U.S. at 588 (Stewart, J.).

<sup>16</sup> *Tawes*, 377 U.S. at 677 (Stewart, J.) (in case *reversing* the Maryland Court of Appeals, "I would *vacate the judgment and remand* the case to the state court for full consideration" of whether the Maryland apportionment method was arbitrary or capricious) (emphases added).

“reasons” were for voting one way or the other. I argue in this essay that the majority opinions silently took for granted tenets of a pluralist theory of politics and representation. Justice Harlan’s blanket dissent took the position that, as a matter of separation of powers, the judiciary ought to stay out of *all* legislative districting disputes. It is my argument here that Justice Stewart’s pattern of votes attempts to argue for a “third way” approach to these disputes, keeping the courts neutral on the issue of *which* political theory to choose, but insisting that *some* theory be in place.

This article proceeds in four parts. First, it will briefly discuss some of the terminology it uses, explicating the meaning of “pluralism” and discussing the chief theoretical alternative, “republicanism.” Then, it will discuss the majority opinions authored by Chief Justice Warren and how they appear to have been driven by an acceptance of pluralistic assumptions about political processes. After that, it compares Justice Stewart’s treatment of the six cases to demonstrate his pattern of voting with the majority in those cases where there was no theory being applied, and against the majority when there apparently was. Finally, it will discuss some ramifications of this distinction.

#### I. *Pluralism vs. Republicanism*

It is especially difficult to precisely define theories of politics and representation, due to the amount of possible gradation in related approaches. Since this is not a piece of political science scholarship, it does not purport to represent the cutting edge of precise distinctions; it is, instead, filled with generalizations that may make true political scientists cringe.

The U.S. Supreme Court has evinced its own hesitancy to attempt to define with precision the meaning of political theories, notwithstanding that the Constitution specifically

guarantees the States a particular theory of governmental organization.<sup>17</sup> Less than twenty years before the State legislative apportionment cases were decided, the Court had reaffirmed its discomfort with providing content to the constitutional guarantee of republican government, declaring that “[v]iolation of the great guaranty of a republican form of government in States cannot be challenged in the courts,”<sup>18</sup> and earlier in the century it had specifically refused to entertain a challenge to a State referendum on Guaranty Clause grounds.<sup>19</sup> Even in the *Reynolds* package of cases, where the Supreme Court had indicated its willingness to substantively adjudge the propriety of state legislative apportionments, the majority did not so much as *cite* the Court’s prior cases expressing the Court’s discomfort with defining exactly what constituted “republicanism.” It seems clear enough that this is a hot potato the Court is uncomfortable dealing with. In part, this is probably because one risks privileging one side or the other of the debate, and of indicating their own point of view on the matter, almost from the very act of attempting to express the concepts in words.

It seems safe to say that “pluralism” can be fairly described as “interest-group politics.”

For example, the theory is described by one critic as follows:

Under th[e pluralistic] view, politics consists of a struggle among interest groups for scarce social resources. Laws are a kind of commodity, subject to the forces of supply and demand. Various groups in society compete for loyalty and support from citizens. Once they are organized and aligned, they exert pressure on political representatives, who respond, in a market-like manner, to the pressures thus exerted. The ultimate result is political equilibrium.

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<sup>17</sup> See U.S. CONST. art. IV, § 4 (“The United States shall guarantee to every State in this Union a Republican Form of Government . . . .”); *Luther v. Borden*, 48 U.S. (7 How.) 1, 42 (1849) (“For as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not. And when the senators and representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal.”).

<sup>18</sup> *Colegrove v. Green*, 328 U.S. 549, 557 (1946).

<sup>19</sup> *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912).

The pluralist approach takes the existing distribution of wealth, existing background entitlements, and existing preferences as exogenous variables. All of these form a kind of prepolitical backdrop for pluralist struggle. The goal of the system is to ensure that the various inputs are reflected accurately in legislation; the system is therefore one of aggregating citizen preferences. This understanding carries with it a particular conception of representation, in which officials respond to constituent desires and exercise little or no independent judgment.<sup>20</sup>

Notwithstanding that this description was written by a critic of pluralism, the pluralism supporter in the same Symposium,<sup>21</sup> in criticizing the arguments offered by supporters of republican theories of government, notes that

[a]s a descriptive matter, there is abundant evidence that all too often politics is just the way the pluralists describe it: ceaseless compromises between competing factions, none of which would pay a nickel to advance the common good, even if they could identify it. It does not take an elaborate empirical study to note the powerful influence that individual self-interest exerts over politics.<sup>22</sup>

It would seem, then, that Sunstein's description of pluralism is fair to the concept. At any rate, for the purposes of this article it is understood to mean something like, "people have differences over what is right and wrong, or good and bad; government action will inevitably satisfy some and dissatisfy others, so the best way to promote social harmony is to allow interest groups to fairly compete for legislative victory and, in so doing, compromise their way to welfare-maximizing outcomes."

It seems fair to say that this theory of politics is the dominant one in America today. Although this article does not attempt an actual survey of teaching materials used in elementary or secondary education, it certainly "sounds" like the sort of explanation of how a legislature works that appear in civics textbooks. It seems like the most natural alternative to the aristocratic, monarchical form of government that the American colonies rejected in declaring

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<sup>20</sup> Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1542–43 (1988) (citations omitted).

<sup>21</sup> Symposium, *The Republican Civic Tradition*, 97 YALE L.J. 1493 (1988).

<sup>22</sup> Richard A. Epstein, *Modern Republicanism—Or the Flight from Substance*, 97 YALE L.J. 1633, 1637 (1988).

their independence: we believe in the wisdom of the crowd, instead of someone who purportedly “knows better than us” telling us what is good or bad, and what ought to be the law or not.

Elements of it even seem to have been expressly embraced by members of the Supreme Court.<sup>23</sup>

This, however, is where the republican alternative raises its head. If it is difficult to define pluralism, it is even more difficult to precisely define republicanism (as the Supreme Court’s hesitancy to dive into the concept discussed above should indicate).<sup>24</sup> For these purposes, it is as much as anything a *criticism of pluralism*. For example, Madison advocated the delegation of governmental power to a select group of citizens, because it would

refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations. Under such a regulation, it may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for the purpose.<sup>25</sup>

Contemporary proponents of republican theories of government are particularly interested in Madison’s notion of “refin[ing] and enlarg[ing]” the public’s understanding of public policy. For example, one proponent of republicanism emphasizes its view that “[t]he function of politics . . . is not simply to implement existing private preferences. Political actors are not supposed to come to the process with preselected interests that operate as exogenous variables. The purpose of politics is not to aggregate private preferences, or to achieve an equilibrium among contending social forces.”<sup>26</sup> Instead, it emphasizes a deliberative process that “is designed to produce

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<sup>23</sup> See, e.g., *Vieth v. Jubelirer*, 541 U.S. 267, 274, 305 (2003) (plurality opinion) (“Political gerrymanders are not new to the American scene. . . . We[, the plurality,] conclude that . . . [the Constitution does not] provide[] a judicially enforceable limit on the political considerations that the States and Congress may take into account when districting.”).

<sup>24</sup> See Sunstein, *supra* note 20, at 1547 (“Republican conceptions of politics diverge substantially from one another; there is no unitary approach that can be described as republican.”).

<sup>25</sup> THE FEDERALIST NO. 10, at 50 (James Madison) (Clinton Rossiter ed., Mentor Printing 1999).

<sup>26</sup> Sunstein, *supra* note 20, at 1548.



*substantively correct outcomes.*”<sup>27</sup> Another critic of pluralism (and proponent of republicanism) criticizes pluralism’s

deep mistrust of people’s capacities to communicate *persuasively* to one another their diverse normative experiences . . . . Pluralism . . . doubts or denies our ability to communicate such material in ways that move each other’s views on disputed normative issues towards felt . . . consensus . . . . It follows that in pure pluralist vision, good politics does not essentially involve the direction of reason and argument towards any common, ideal, or self-transcendent end. For true pluralists, good politics can only be a market-like medium through which variously interested and motivated individuals and groups seek to maximize their own particular preferences.<sup>28</sup>

This sort of rhetoric is jarring to the ear of most contemporary people who are politically aware. It smacks of the sort of aristocratic, let-your-betters-think-for-you theory of politics that the American colonies apparently rejected when they went to war against the King. In particular, the notion that there is a “substantively correct outcome” and that people can be “persuaded” to think differently sounds extraordinarily paternalistic. It sounds naïve (to be generous) to suggest that debates about abortion, or gay marriage, could be resolved if the best and brightest got together, talked it out, and came to some inevitable “right” answer. Indeed, republicanism might even sound dangerous: “[t]he most objectionable exercises of governmental power are often associated with approaches that see character formation as an end of politics.”<sup>29</sup> Pluralism is a comforting alternative because it “respect[s] current preferences,” “desire[s] to avoid the risks of tyranny that are associated with active and self-conscious preference-shaping by public officials,” and “is committed to familiar conceptions of majority rule and to a healthy revulsion to regimes that take citizen preferences as an object of collective control.”<sup>30</sup>

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<sup>27</sup> *Id.* at 1554 (emphasis added).

<sup>28</sup> Frank Michelman, *Law’s Republic*, 97 YALE L.J. 1493, 1507–08 (1988).

<sup>29</sup> Sunstein, *supra* note 20, at 1543.

<sup>30</sup> *Id.* (citation omitted).

Somewhat less jarring might be the republican emphasis on “political equality,” at least at first glance. In this context, republican theory sees equality as “a requirement that all individuals and groups have access to the political process; large disparities in political influence are disfavored.”<sup>31</sup> At first glance, this seems appealing to the contemporary thinker: everyone deserves to have their “voice” heard. At the same time, further thought makes it somewhat discomfiting: some approaches to giving groups equal access to the political process may produce unfamiliar results. For example, many State election codes have provisions for identifying those political parties with sufficient popular support that we might say they are “legitimate,” or deserving of recognition via the election process<sup>32</sup>; would anybody support giving each such party an equal number of seats in the legislature, so that all points of view have equal access to the decision-making process? Yet, if republican theory emphasizes that there is a “right” answer, and that the input of differing viewpoints has per se value, this might not offend it; the views of the Libertarian Party may be as helpful to the search for truth as the views of the Democratic Party, so why not give it an equal seat at the table?

Which of these is the superior theory is not the point of this paper. The point is simply this: there are legitimate competing alternatives. We may find that we prefer one, or the other, or combinations of them both. Whether any particular governmental form can definitely be defined as one or the other is immaterial; the preceding discussion of their differences should leave us suitably respectful of the difficulty of locating each theory’s edges. Moreover, it can be easy to forget that there is a relatively developed set of theories and opinions regarding a system of

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<sup>31</sup> *Id.*

<sup>32</sup> See, e.g., MICH. COMP. LAWS ANN. § 168.16 (West 2004) (“‘[M]ajor political party’ means each of the 2 political parties whose candidate for the office of secretary of state received the highest and second highest number of votes at the immediately preceding general election in which a secretary of state was elected.”); *id.* § 168.532 (“A political party whose principal candidate received less than 5% of the total vote cast for all candidates for the office of secretary of state in the last preceding state election . . . shall not make its nominations by the direct primary method.”).

government that tends to assume that there are “right” answers to society’s problems that can be arrived at through considered deliberation amongst representatives of society’s various viewpoints, instead of the tacit presumption that political society exists to allow the majority to have its way in such a fashion that the minority is not unduly persecuted (an easy assumption to make given the basic pluralistic model employed in the U.S.).

## II. *Chief Justice Warren, the Pluralist*

The immense popularity of direct democracy<sup>33</sup> could be interpreted as a sign that, even without the *Reynolds* package of cases, Americans have essentially embraced a pluralistic view of politics. On the other hand, it is entirely possible that the package of state legislative reapportionment cases, and indeed the equipopulation reapportionment cases from that era generally,<sup>34</sup> have contributed to the contemporary acceptance of pluralism as the default set of assumptions and incentives behind political society. Therefore, it is important to locate the pluralist assumptions extant in the opinions.

In the *Reynolds* package of cases, the majority that Chief Justice Warren spoke for asserted that it was merely construing the 14<sup>th</sup> Amendment’s Equal Protection Clause.<sup>35</sup> Justice Stewart disagreed.

What the Court has done is to convert a particular political philosophy into a constitutional rule, binding upon each of the 50 States, from Maine to Hawaii, from Alaska to Texas, without regard and without respect for the many individualized and differentiated characteristics of each State, characteristics stemming from each State's distinct history, distinct geography, distinct distribution of population, and distinct political heritage. My own understanding of the various theories of representative government is that no one theory has ever

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<sup>33</sup> See, e.g., Marvin Krislov & Daniel M. Katz, *Taking State Constitutions Seriously*, 17 CORNELL J.L. & PUB. POL’Y 295, 301 (2008) (“Virtually every single American state features some form of direct democracy.”).

<sup>34</sup> More than just state legislative districting was being litigated at the time. See *Wesberry v. Sanders*, 376 U.S. 1 (1964) (U.S. House of Representatives districting); *Gray v. Sanders*, 372 U.S. 368 (1963) (“county unit system” in electing party nominees).

<sup>35</sup> U.S. CONST. amend. XIV, § 1.

commanded unanimous assent among political scientists, historians, or others who have considered the problem. But even if it were thought that the rule announced today by the Court is, as a matter of political theory, the most desirable general rule which can be devised as a basis for the make-up of the representative assembly of a typical State, I could not join in the fabrication of a constitutional mandate which imports and forever freezes one theory of political thought into our Constitution, and forever denies to every State any opportunity for enlightened and progressive innovation in the design of its democratic institutions, so as to accommodate within a system of representative government the interests and aspirations of diverse groups of people, without subjecting any group or class to absolute domination by a geographically concentrated or highly organized majority.<sup>36</sup>

The majority opinion in *Lucas* did not address any of Justice Stewart's criticisms in dissent; nor did the majority opinion in *WMCA*, to which Stewart's dissent also applied. To the extent that the majority addressed the concerns about political theory at all, they simply asserted that

apportioning seats . . . cannot be sustained by recourse to the so-called federal analogy. Nor can any other inequitable state legislative apportionment scheme be justified on such an asserted basis. This does not necessarily mean that such a plan is irrational or involves something other than a 'republican form of government.' We conclude simply that such a plan is impermissible for the States under the Equal Protection Clause, since perforce resulting, in virtually every case, in submergence of the equal-population principle in at least one house of a state legislature.<sup>37</sup>

Either Chief Justice Warren's majority opinion was exhibiting the height of judicial arrogance, or else it simply did not perceive the theoretical import of its action. The best conclusion is the latter: Warren simply took for granted, uncritically, certain pluralistic assumptions about political society, making the cases seem easy.

Arguably the boldest evidence that the Court majority tacitly accepted pluralist political theories is in arguably its most famous (or at least most poetic) line from any of the six cases.

"Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or

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<sup>36</sup> *Lucas*, 377 U.S. at 748–49 (Stewart, J., dissenting).

<sup>37</sup> *Reynolds*, 377 U.S. at 575.

cities or economic interests.”<sup>38</sup> This certainly seems to express distrust of a notion that there is a “right” answer to social problems that can be reached if every perspective is accounted for (even if that requires amplifying some perspectives in order that they be heard). The next sentence of the opinion, which is perhaps less famous, expresses the Court’s assumptions even more clearly: “As long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and *directly representative of the people*, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system.”<sup>39</sup> The Court offered no further elaboration on this point, perhaps indicating that it considered it uncontroversial. A conclusion, however, that our legislators are “directly representative of the people” would seem to clash with Madison’s argument that representatives ought to “refine and enlarge” the attitudes and opinions of the public, and not merely respond to them. Indeed, the political structure may itself have pedagogical value beyond what the legislators learn from each other and communicate to their constituents; in being forced to accommodate disparate interests and work through a sometimes frustrating legislative process, the system arguably provides for imposed humility on those individuals and policy preferences that “deserve” to be in power.<sup>40</sup>

Again, later in the opinion the Court asserts that, “[s]ince legislatures are responsible for enacting laws by which all citizens are to be governed, *they should be bodies which are collectively responsive to the popular will*.”<sup>41</sup> The Court that says such a thing seems to disagree with Madison’s argument “that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves.”

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<sup>38</sup> *Id.* at 562.

<sup>39</sup> *Id.* (emphasis added).

<sup>40</sup> Cf. Glen Staszewski, *Rejecting the Myth of Popular Sovereignty and Applying an Agency Model to Direct Democracy*, 56 VAND. L. REV. 395, 401–03 & nn.23–25 & 27 (2003) (discussing the Founders’ concerns about majority faction and the importance of “deliberative” (as opposed to direct) democracy).

<sup>41</sup> *Reynolds*, 377 U.S. at 565 (emphasis added).

Similarly, the majority declares that “the basic principle of representative government remains, and must remain, unchanged—the weight of a citizen's vote cannot be made to depend on where he lives. *Population is, of necessity, the starting point for consideration and the controlling criterion for judgment in legislative apportionment controversies.*”<sup>42</sup> While this may or may not be true, it was surely not the opinion of Madison, who asked, “Why may not *illicit combinations* . . . be formed as well by *a majority of a State*, especially a small State as by a majority of a county, or a district of the same State?”<sup>43</sup> The attitude exuded by the court majority seems to be: “who is to say what’s an ‘illicit majority,’ Mr. Madison?”

As a consequence of this discussion of the Court’s theoretical acceptance of pluralist political assumptions, it should come as no surprise that the Court fixated on statistical population deviations. In fact, the majority cited, in all six of these reapportionment cases, the maximum population deviation between the smallest and largest districts, and the smallest number of districts representing a majority of the State’s population.<sup>44</sup> Although this certainly provided for easier, more administrable rules of law for the lower courts to administer, it also cast the debate as whether the more populous portions of a State (i.e., the city) got a voice in proportion to their size vis-à-vis the less-populous portions of a State (i.e., rural areas).

The Court’s distrust of representation by political unit is fully consonant with the pluralistic approach to political theory that assumes political groups will seize those public resources they can while they are in power. If Democrats do what is right for Democrats, or blacks do what is right for blacks, or rural areas do what is right for rural areas when they are in power, it makes sense that the Legislature should be designed in order to maximize the

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<sup>42</sup> *Id.* at 567 (emphasis added).

<sup>43</sup> THE FEDERALIST NO. 43, at 244 (James Madison) (Clinton Rossiter ed., Mentor Printing 1999).

<sup>44</sup> *Lucas*, 377 U.S. at 725–27; *Roman*, 377 U.S. at 704–05; *Davis*, 377 U.S. at 687–689; *Tawes*, 377 U.S. at 665–67; *WMCA, Inc.*, 377 U.S. at 647–48; *Reynolds*, 377 U.S. at 545–46.

preferences of the most people. Although if this were the theory standing alone, it would run afoul of the problem of “majority faction” feared by the Founders,<sup>45</sup> committed American pluralists can rightly point to our Bill of Rights as the “safety net” that allows for governance by “majority faction” as a matter of course while preventing majority *tyranny*. Thus, the majority’s comfort with pluralistic forms of governance is understandable, whether or not one agrees with their conclusions or reasoning.

Perhaps the strongest evidence of the Court’s embrace of a particular theory of representational structures can be found not in its own opinion, but in the comments of its supporters. For example, one extremely laudatory account of the reapportionment cases had this to say about the significance of the Court’s decisions:

John Marshall’s centrist federalism is still atop the heap [after the reapportionment cases]; *states rights remains mostly a myth*. It may be true, as Chief Justice Warren once suggested, that the reapportionment cases returned a certain amount of viability to state legislatures. But it was still done by repeated trips through the Fourteenth Amendment to the federal Constitution. Each trip cost a bit of the myth; *by the time the reapportionment revolution was ended, one could see little of value left in a state constitution that could not be handled in statutory law*. The form of state government was largely established by court construction of the federal Constitution; election rules were set there; the Fourteenth had activated for all the states almost every clause of the American Bill of Rights. So what was left of states rights?

I do not deplore the loss. Most American citizens had not the slightest notion that before this Fourteenth Amendment revolution began, the Bill of Rights was not necessarily a shield they could count on. At the same time, most of the public commotion over *Reynolds*, I fancy, *sprang from the mistaken notion of many individuals that their own state legislatures were somehow properly structured after a model they had come to respect—the United States Congress*.<sup>46</sup>

Ironically, the emphasized passages indicate exactly the sort of paternalism that the Court was suspicious of in disallowing “over-representation” of “under-populated” areas.

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<sup>45</sup> See THE FEDERALIST NO. 10 (James Madison).

<sup>46</sup> GENE GRAHAM, ONE MAN, ONE VOTE 292–93 (1972) (emphases added).

This apparently unwitting embrace of the sort of paternalism it was striking against is an example of how, as is often the case when seemingly obvious notions are taken for granted without being thoroughly explained and justified, the Court did not consistently apply its own theories. Over the course of the six cases, the Court mixed-and-matched concerns for individual rights to a fair and equally-weighted vote, and society's interest in preserving popular sovereignty. For example, in *Lucas*, the Court rejected an amendment to the Colorado Constitution that provided for representation that was insufficiently population-based, even though that amendment had been approved by a majority of voters statewide and a majority of voters in every county.<sup>47</sup> Moreover, as subsequent experience has demonstrated, it is entirely possible to draw up districts that contain equal numbers of individuals, but do not proportionately represent the varying political tastes and inclinations of the populace.<sup>48</sup> As Justice Stewart noted,

[t]he very fact of geographic districting, the constitutional validity of which the Court does not question, carries with it an acceptance of the idea of legislative representation of regional needs and interests. Yet if geographical residence is irrelevant, as the Court suggests, and the goal is solely that of equally 'weighted' votes, I do not understand why the Court's constitutional rule does not require the abolition of districts and the holding of all elections at large.<sup>49</sup>

Nevertheless, the point is this: the Court seemed to accept pluralism, or pluralistic assumptions about governance, in deciding these reapportionment cases. It was suspicious of a paternalistic

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<sup>47</sup> *Lucas*, 377 U.S. at 731 (“[A] majority of the voters in every county of the State voted in favor of the apportionment scheme embodied in Amendment No. 7's provisions, in preference to that contained in proposed Amendment No. 8, which, subject to minor deviations, would have based the apportionment of seats in both houses on a population basis.”).

<sup>48</sup> This is sometimes disparagingly called “gerrymandering.”

<sup>49</sup> *Lucas*, 377 U.S. at 750 (Stewart, J., dissenting). Imagine the following worst-case scenario: a State with 100 legislative districts, each with 100,000 residents. Control of 51 districts is needed to control the legislature. Assume that 49 of the districts consist exclusively of some hypothetical A Party; this accounts for 4,900,000 of the State's 10,000,000 people. Assume that the other 51 districts each have 50,001 B Party residents, and 49,999 A Party residents. Assuming everyone votes for their party preference, the B Party will win in those 51 districts and control the Legislature. However, the B Party has only 2,550,051 out of 10,000,000 voters, or 25.5% of the electorate.



attitude that thinks there are “right” answers to society’s problems, and that considered deliberation can persuade factions to arrive at that answer. The Court may even have been rightfully suspicious; decades of white efforts at using the mechanics of representation and elections to reduce blacks to political pariahs would probably tend to make the Court suspicious of arguments that rural areas that just so happen to be predominantly white deserve to have their legislative voice amplified vis-à-vis cities which just so happen to be predominantly black.

### III. *Justice Stewart’s Cryptic Votes: What Does the Pattern Mean?*

Justice Stewart’s dissent, attached to the *Lucas* opinion, applied only in that case and in *WMCA*. He filed four other cryptic opinions, each of which stated that he voted as he did due to the reasons expressed in the aforementioned dissent, even though that dissent didn’t actually discuss the other four situations specifically. Although the lack of extended explication makes it less than completely clear what Justice Stewart’s vote was after only a superficial examination of his opinion in each of the four cases, analysis indicates that he voted with the majority in *Reynolds*, *Davis*, and *Roman*, and dissented in *Tawes*. It seems clear enough that Justice Stewart was occupying some sort of middle ground between the majority, which intended to demand a uniform rule of population equality, and Justice Harlan, who seemed to prefer total judicial abdication of resolving these sorts of disputes. But what was the nature of that middle ground?

Before proceeding, it would be helpful at this time to reproduce a representative sample of Justice Stewart’s brief comments in these other four cases:

MR. JUSTICE STEWART.

In this case the appellees showed that the apportionment of seats among the districts represented in the Delaware House of Representatives and within the counties represented in the Delaware Senate, apparently reflects “no policy, but simply arbitrary and capricious action.” The appellants have failed to dispel this showing by suggesting any possible rational explanation for these aspects of Delaware’s system of legislative apportionment. Accordingly, for the reasons

stated in my dissenting opinion in *Lucas v. Forty-Fourth General Assembly of Colorado*, *post*, p. 744, I would affirm the judgment of the District Court insofar as it holds that Delaware's system of apportionment violates the Equal Protection Clause.<sup>50</sup>

Similar comments appeared under Justice Stewart's name in *Reynolds*, *Tawes*, and *Davis*.

Contrary to the suggestion of the text, Justice Stewart's dissenting opinion in *Lucas* did not "state" his reasons for voting as he did in *Reynolds*, *Tawes*, *Davis*, or *Roman*. We are left to our own devices to determine the distinction he discerned between the cases. He apparently saw a difference between them discerned neither by the majority (which required an across-the-board equal population rule) nor Justice Harlan (who advocated no judicial oversight at all).

It will be easier to see the differences if we first understand what was the same about the apportionment methods. In every case, the population disparities that the majority objected to were caused, for one reason or another, by an unwillingness to break up counties and combine them with parts of other counties in order to create districts with more equal populations. Thus, for example, none of the districting schemes employed would have allowed Michigan's current 98<sup>th</sup> House District, which consists of several whole and partial municipalities in Midland County, along with several municipalities in Saginaw County.<sup>51</sup> On the other hand, they would not have *uniformly* objected to Michigan's 1<sup>st</sup> House District, which contains part of the City of Detroit and several neighboring municipalities, all located within Wayne County.<sup>52</sup> Nor would they have *uniformly* objected to Michigan's 32<sup>nd</sup> Senate District, which consists of Saginaw and Gratiot Counties (no more and no less).<sup>53</sup>

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<sup>50</sup> *Roman*, 377 U.S. at 712 (Stewart, J.).

<sup>51</sup> See MICH. COMP. LAWS ANN. § 4.2001 (West 2004).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* § 4.2002.

It is, perhaps, best to start the search for differences with the most notorious of the cases decided by the Court in this batch: *Reynolds*. In that case, the Alabama Legislature had ignored the mandate of the Alabama Constitution to reapportion itself after the decennial census, and instead continued to utilize the provisional apportionment provided for in the Alabama Constitution since its ratification in 1901.<sup>54</sup> Although the Alabama Constitution had elaborate provisions about how seats were to be awarded, allowing counties to be combined into districts but only as whole units (for the Senate) and distributing House seats such that each county got at least 1 seat, they hadn't actually been put into practice; the Legislature simply didn't reapportion the seats amongst the counties in the intervening 60 years, making the contemporary apportionment seem apparently arbitrary.<sup>55</sup>

Two of the other cases presented apportionments that were similarly arbitrary, albeit for different reasons. In Delaware (*Roman*), each of Delaware's 3 counties got identical representation in both chambers of its legislature, along with special representation for its arguably *sui generis* metropolitan area (Wilmington), but whatever the merits of this approach, the State Constitution specifically described the boundaries of each election district within the counties and was apparently arbitrary.<sup>56</sup> In Virginia (*Davis*), the Virginia Constitution provided no rules for apportioning seats *at all*; instead, it simply set a number of seats, and the legislature drew up an *ad hoc* election map that took as indivisible units the State's counties and independent cities, and combined them in various election districts and overlay (or, "floterial")

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<sup>54</sup> The plaintiffs in *Reynolds* noted that "the Alabama Legislature had established a pattern of prolonged inaction from 1911[, the Alabama Legislature's first opportunity to reapportion after the taking of the 1910 Census, the first census subsequent to the Alabama Constitution's ratification in 1901,] to the present[, 1964,] which 'clearly demonstrates that no reapportionment . . . shall be effected.'" *Reynolds*, 377 U.S. at 540.

<sup>55</sup> See *Reynolds*, 377 U.S. at 540–41 (citing *Ex parte Rice*, 143 So. 2d 848 (Ala. 1962); Opinion of the Justices, 81 So. 2d 881, 887 (Ala. 1955); *Waid v. Pool*, 51 So. 2d 869, 870 (Ala. 1951); Opinion of the Justices, 47 So. 2d 714, 717 (Ala. 1950)).

<sup>56</sup> *Roman*, 377 U.S. at 704.

election districts to mete out the seats.<sup>57</sup> Obviously, relatively substantial population differences existed between the majority's perception of the "voting strength" of different blocs of voters.<sup>58</sup>

Conversely, in New York/*WMCA, Inc.* and Colorado/*Lucas*, the State Constitutions set out formulas for apportioning seats (unlike in Virginia/*Davis*) amongst established political subdivisions (unlike in Delaware/*Roman*), and that formula was being followed (unlike in Alabama/*Reynolds*). Granted, the formulas tended to disfavor urban areas. For example, the New York scheme was an extremely complicated effort to prevent New York City from gaining a larger *share* of the seats in the State Senate as its population increased, by increasing the size of the body to accommodate population growth in the City instead of allocating increasing numbers of seats to it in a zero-sum fashion.<sup>59</sup> Nevertheless, they were *formulaic*. Moreover, in New York, the voters had recently defeated a ballot proposal calling for a constitutional convention to address the issue of perceived malapportionment,<sup>60</sup> while the voters of Colorado had recently

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<sup>57</sup> *Davis*, 377 U.S. at 685–86 & n.2. For example, "the City of Lynchburg, with a . . . population of 54,790, [was] itself allocated one seat in the Virginia House of Delegates . . . Amherst County, with a population of only 22,953, [was] not given any independent representation in the Virginia House. But the City of Lynchburg and Amherst County [were] combined in a floterial district with a total population of 77,743. Presumably, it was felt that Lynchburg was entitled to some additional representation in the Virginia House, since its population significantly exceeded the ideal House district size of 36,669. However, since Lynchburg's population did not approach twice that figure, it was apparently decided that Lynchburg was not entitled, by itself, to an added seat. Adjacent Amherst County, with a population substantially smaller than the ideal district size, was presumably felt not to be entitled to a separate House seat. The solution was the creation of a floterial district comprising the two political subdivisions, thereby according Lynchburg additional representation and giving Amherst County a voice in the Virginia House, without having to create separate additional districts for each of the two political subdivisions." *Id.* at 686 n.2.

<sup>58</sup> *Davis*, 377 U.S. at 688–89.

<sup>59</sup> For more information on this complex and fascinating apportionment scheme, see Ruth C. Silva, *Apportionment in New York*, 30 *FORDHAM L. REV.* 581 (1962), and Ruth C. Silva, *Apportionment of the New York Assembly*, 31 *FORDHAM L. REV.* 1 (1962).

<sup>60</sup> See *WMCA, Inc.*, 377 U.S. at 638 ("[New York] voters had twice disapproved proposals for a constitutional convention to amend the constitutional provisions relating to legislative apportionment . . . [T]he 1957 vote on whether to call a constitutional convention was 'heralded as an issue of apportionment' by the then Governor, but . . . nevertheless a majority of the State's voters chose not to have a constitutional convention convened."); CALVIN B. T. LEE, *ONE MAN, ONE VOTE* 5 (1967) ("An attempt to bring about change by constitutional convention failed in 1957. Although the state constitution allows the voters to decide every twenty years whether a convention should be held to consider constitutional changes, half of the voters in 1957 did not even vote on the question. Of those who did, 48% favored a convention and 52% did not; 1977 would be the next opportunity to again bring up the issue."). The next sentence is, perhaps, telling of the echo chamber that Mr. Lee and the *Reynolds* majority lives in: "Thus [reapportionment proponents] w[ere] left with only the alternative of going to the courts." *Id.* (emphasis added).

approved the apportionment scheme struck down in *Lucas* in a referendum.<sup>61</sup> In short, the systems seemed to be “working.”

Unsurprisingly, given the middle-of-the-road approach Justice Stewart was pursuing, he reserved his most subtle vote for *Tawes*, the most difficult of the cases. In *Tawes*, the Maryland Constitution specifically prescribed the number of seats each County received in the State House, as well as the City of Baltimore.<sup>62</sup> In the Senate, each County got the same representation (1 seat), while Baltimore got 6 seats.<sup>63</sup> Given Stewart’s apparent antipathy toward the “permanent provisional” apportionment in *Reynolds*, it is difficult to argue that he would have supported a similar result in the Maryland House simply because it was not a provisional apportionment, but instead a permanent “crazy quilt.” On the other hand, the Maryland Senate presents more difficult issues. In Maryland, Baltimore’s size and importance arguably make it *sui generis* like Wilmington was in *Roman*.<sup>64</sup> On the other hand, the line between being *sui generis* and simply preferred for superior treatment is blurry. Thus, it is perhaps no surprise that Stewart voted not with the majority to invalidate Maryland’s apportionment, nor with Harlan’s dissent professing no judicial role in assessing it. Instead, he voted to remand the case to the Maryland Court of Appeals for more factfinding as to whether the scheme was arbitrary or capricious.<sup>65</sup>

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<sup>61</sup> *Lucas*, 377 U.S. at 731 (“[A] majority of the voters in every county of the State voted in favor of the apportionment scheme embodied in Amendment No. 7’s provisions, in preference to that contained in proposed Amendment No. 8, which, subject to minor deviations, would have based the apportionment of seats in both houses on a population basis.”).

<sup>62</sup> *Tawes*, 377 U.S. at 665–66.

<sup>63</sup> *Id.* at 664.

<sup>64</sup> Note that Stewart was able to avoid reaching this tricky issue in *Roman*, apparently because the specific description of each election district in each county adhered to no apparent theory of representational structures.

<sup>65</sup> *Id.* at 676–77 (Stewart, J.) (“In this case *there is no finding* by this Court or by the Maryland Court of Appeals that Maryland’s apportionment plan reflects ‘no policy, but simply arbitrary and capricious action or inaction.’ Nor do I think such a finding *on the record before us* would be warranted. Consequently, . . . I would affirm the judgment of the Maryland Court of Appeals *unless the Maryland apportionment ‘could be shown systematically to prevent ultimate effective majority rule.’* The Maryland court did not address itself to this question. Accordingly, I would vacate the judgment and *remand this case to the state court for full consideration of this issue.*”) (citation omitted, emphases added).

The implicit message of Justice Stewart's votes is that the Court ought to remain neutral as between theories of political organization, but ought to insist that *some* theory be in place. Indeed, although his dissent has a decidedly republican flavor,<sup>66</sup> the actual pattern of his votes suggests that he was simply concerned that representational structures be *principled*. Justice Harlan's basically absolutist position that apportionment is not an area that the Court can properly adjudicate would, for example, have left the State of Alabama free to leave its decades-old provisional apportionment in place long after the facts upon which it was based in 1901 had changed. The majority's position essentially constitutionalized a rule of pluralistic political organization, on the commonly-held assumption that the legislature should be an accurate cross-section of the actual distribution of opinions and perspectives. As between those two approaches, it would seem only Justice Stewart was standing for the notion that States ought to be able to adopt approaches that attempt to bring all perspectives to the table (and, in the process, amplifying some of them more than their share of the population would indicate) in order to consensually arrive at a socially-maximizing outcome, without precluding them from preferring a pluralistic alternative should they so desire.

#### IV. *Why Does Justice Stewart's Voting Pattern Matter?*

The slimmest majority in these six cases was the 6–3 majorities in *WMCA* and *Lucas*. As a result, it cannot be argued that a proper understanding of Justice Stewart is a forgotten “tipping point” of understanding these cases; even without his vote, Chief Justice Warren's pluralistic opinion would have commanded a majority. There are, however, good reasons to study the

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<sup>66</sup> See, e.g., *Lucas*, 377 U.S. at 749, 751 (Stewart, J., dissenting) (“[L]egislative apportionment . . . should ideally be designed to insure *effective representation . . . of the various groups and interests making up the electorate*. . . . [Population] must often to some degree be subordinated in devising a legislative apportionment plan which is to achieve the important goal of ensuring a fair, *effective, and balanced representation of the regional, social, and economic interests within a State*. . . . [S]o long as a State's apportionment plan reasonably achieves, in the light of the State's own characteristics, *effective and balanced representation of all substantial interests*, without sacrificing the principle of effective majority rule, that plan cannot be considered irrational.”) (emphases added).

distinction. It is easy to see Justice Harlan as the standard-bearer for the opposition to the majority in *Reynolds*, but if forced to choose between his vision of judicial abdication of apportionment oversight, and the majority's equal population rule, even many judicial conservatives might side with the majority. Justice Stewart offers a helpful "third way" to assess apportionment issues. That the current equipopulation rule seems inextricably entrenched may have as much to do with the logistical problems with challenging it as anything else.<sup>67</sup>

There are at least two reasons why recognizing Justice Stewart's unique position in these reapportionment cases is valuable. First, there is reason to believe that American society has lost its interest in and commitment to sub-national levels of government. The reapportionment cases may have had something to do with this: since it is virtually impossible to provide representation by political sub-unit, Americans may have made the rational decision to pay less attention to levels of government that offer them little to identify with. Additionally, from a doctrinal point of view, there is reason to believe that contemporary constitutional law casebooks mis-construe Justice Stewart's position in these cases. In doing so, they mask the issues at play in these cases and fail to prompt students to think more critically about this area of Equal Protection doctrine.

#### A. *American Interest in Local Affairs May Have Waned*

I consider it uncontroversial to assert that Americans pay little heed to sub-national political matters. In part, this is probably because many sub-national units of government can seem interchangeable. In my own corner of the world, I cannot say with certainty which of several possible municipalities I live within, and there are relatively few reasons to go to the trouble to find out with greater certainty. Although there are legitimate reasons for this

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<sup>67</sup> It seems apparent that the only way to effectively challenge the equipopulation principle would be for a State to enact a new Constitution (or, constitutional amendment) that would depart from the equipopulation rule and provoke a challenge, generating an opportunity for the Court to reconsider the rule. It seems equally apparent that this issue is not something that provokes sufficient public passion for a State to embark on such an experiment.

indifference, at the same time, it is the smaller, local units of government that decide to do things like pave roads, make traffic stops, regulate land use, and put on most criminal trials. It is at least arguable that the incentives are in place for every voter to be passionately interested in their local government as that which provides the most-used services.

Arguably, Americans once *did* identify more with local government than they do now. Although not a scientific study by today's standards, it hardly needs substantiating that Alexis de Tocqueville's *Democracy in America* is a widely respected collection of insights into what American society was like in the bygone early 19<sup>th</sup> century. On the strength of certain of his observations that were uniquely prescient, such as that Russia and the United States "seem[] called by some secret design of Providence one day to hold in [each of their] hands the destinies of half the world,"<sup>68</sup> Tocqueville is a staple of political science education in the United States.

Often, Tocqueville describes an America, particularly a series of American attitudes about local affairs, that seems jarringly inconsistent with contemporary attitudes. His baseline model was the New England township. "The New Englander is attached to his township not so much because he was born there as because he sees his township as a free, strong corporation of which he is part and which is worth the trouble of trying to direct."<sup>69</sup> New Englanders, in Tocqueville's view, were so passionate about their townships that the township "form[s] the nucleus of strong attachments, and there is meanwhile no rival center close by to attract the hot hearts of ambitious men."<sup>70</sup> "No ambitious man" would make the pursuit of high federal office "the fixed aim of his endeavors" when "[i]t is in the township, the center of the ordinary business

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<sup>68</sup> ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 413 (J.P. Mayer ed., George Lawrence trans., Perennial Classics 2000).

<sup>69</sup> *Id.* at 68.

<sup>70</sup> *Id.* at 69.



of life, that the desire for esteem, the pursuit of substantial interests, and the taste for power and self-advertisement are concentrated.”<sup>71</sup> It is fair to say that the “money quote” might be this one:

The New Englander is attached to his township because it is *strong and independent*; he has an interest in it because he shares in its management; he *loves it* because he has no reason to complain of his lot; he invests his ambition and his future in it; in the restricted sphere within his scope, he learns to rule society; he gets to know those formalities without which freedom can advance only through revolutions, and becoming imbued with their spirit, develops a taste for order, understands the harmony of powers, and in the end accumulates clear, practical ideas about the nature of his duties and the extent of his rights.<sup>72</sup>

It goes without saying that this may sound appealingly poetic, but it does not match the attitude many people have about townships. Tocqueville recognized that, however; he knew that New England townships were a special beast. No, “the farther one goes from New England, the more the *county* tends to take the place of the township in communal life.”<sup>73</sup> The county is so influential that it “becomes the great administrative center and the intermediary between the government and the plain citizen.”<sup>74</sup> It takes the place of the township as the “[l]ocal institution[] [which is] to liberty what primary schools are to science; they put it within the people’s reach; they teach people to appreciate its peaceful enjoyment and accustom them to make use of it.”<sup>75</sup> Indeed, municipalities are so important that, “[w]ithout local institutions a nation may give itself a free government, but it has not got the spirit of liberty.”<sup>76</sup>

Tocqueville thought local institutions were important in and of themselves, irrespective of the number of people that lived there. The Supreme Court in the reapportionment cases disagreed. The county-based apportionments the Court struck down appeared to it “often to be

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<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 70 (emphases added).

<sup>73</sup> *Id.* at 81 (emphasis added).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 63.

<sup>76</sup> *Id.*

little more than an after-the-fact rationalization offered in defense of maladjusted state apportionment arrangements.”<sup>77</sup> Could the Supreme Court’s skepticism of the validity of county-based apportionments have anything to do with our atrophied sense of importance of local government today? It is hard to demonstrate that with any certainty. On the other hand, there is little reason to think that Justice Harlan’s argument in favor of (essentially) total judicial disregard for overseeing apportionment methods would have done anything more to inculcate affinity for local government. But Justice Stewart’s forgotten middle position may have provided a way for the States to “push” their citizens to care more about local government. Being trapped between inaction or equal population left no room for schemes such as the Board of Supervisors that was originally to govern counties in Michigan,<sup>78</sup> when the Supreme Court held that county governance bodies also must be apportioned on a “one-man, one-vote” basis.<sup>79</sup>

#### *B. Casebooks Consistently Paper Over Justice Stewart’s Position*

When one stops to think about it, it really is quite surprising how many casebooks exist on topics as complex as constitutional law. Consider how daunting the task would be to start writing a new casebook on *any* topic, let alone one analyzed so exhaustively. Then consider the pressure to provide a unique service, to make a casebook that is better or offers something that competitors do not. It is a process that this article does not intend to suggest any real knowledge or expertise concerning; it is beyond this project.

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<sup>77</sup> *Reynolds*, 377 U.S. at 573.

<sup>78</sup> MICH. CONST. art. VII, § 7 (“A board of supervisors shall be established in each organized county consisting of one member from each organized township and such representation from cities as provided by law.”), *held unconstitutional by In re Advisory Opinion*, 158 N.W.2d 497 (Mich. 1968) (per curiam).

<sup>79</sup> *Avery v. Midland County*, 390 U.S. 474 (1968).

For the purposes of this article, I surveyed seven leading casebooks on constitutional law<sup>80</sup> and their treatment of *Reynolds* and its companion cases. Of course, not every group of casebook authors will choose to emphasize the same matters equally; for some topics, it may be enough to fill in readers on what the “rule” is in an area of jurisprudence instead of extensively fleshing out the history and development of the doctrine. The choice of what texts to emphasize is the product of the particular expertise of the respective casebook authors<sup>81</sup> and beyond the scope of this article, and there is no intention to second guess those decisions here. As a result, those casebooks that chose not to make *Reynolds* a principal case are outside this analysis,<sup>82</sup> as well as the book that excerpted the majority opinion in *Reynolds*, but offered no comparison or analysis of it with any of the other opinions discussed in this article.<sup>83</sup>

To the extent that a casebook *does* excerpt a case, however, it is fair to say that the consideration of the case ought to be complete and not misleading. If a casebook author considers *Reynolds* to be sufficiently important to excerpt it at length, as well as the Harlan and Stewart dissenting opinions filed with it, then presumably that author should be complete in his or her presentation of the case. And yet, as the preceding discussion indicates, at least Justice Stewart’s pattern of votes in the collected cases appears to have been relatively fact-specific. A

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<sup>80</sup> JEROME A. BARRON, C. THOMAS DIENES, WAYNE MCCORMACK & MARTIN H. REDISH, CONSTITUTIONAL LAW (7th ed. 2006); PAUL BREST, SANFORD LEVINSON, JACK M. BALKIN, AKHIL REED AMAR & REVA B. SIEGEL, PROCESSES OF CONSTITUTIONAL DECISIONMAKING (5th ed. 2006); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW (2d ed. 2005); JESSE H. CHOPER, RICHARD H. FALLON, JR., YALE KAMISAR & STEVEN H. SHIFFRIN, CONSTITUTIONAL LAW (10th ed. 2006); WILLIAM COHEN, JONATHAN D. VARAT & VIKRAM AMAR, CONSTITUTIONAL LAW (12th ed. 2005); GEOFFREY R. STONE, LOUIS MICHAEL SEIDMAN, CASS R. SUNSTEIN, MARK V. TUSHNET & PAMELA S. KARLAN, CONSTITUTIONAL LAW (5th ed. 2005); KATHLEEN SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW (16th ed. 2007).

<sup>81</sup> See, e.g., COHEN ET AL., *supra* note 80, at vi n.1 (“[W]e view the selection, sequencing and editing of cases . . . as a primary service we provide in the book . . .”).

<sup>82</sup> See BARRON ET AL., *supra* note 80, at 912–13; BREST ET AL., *supra* note 79, at 916, 1155.

<sup>83</sup> See COHEN ET AL., *supra* note 80, at 937–43. Arguably, this is akin to the comments about the casebooks that offered incomplete or misleading characterizations of the other opinions, but it is also analogous to the casebooks that briefly state the equipopulation rule of *Reynolds* and quote a few paragraphs of the Court’s logic. Ultimately, since it does not present the other opinions, it cannot do so in a misleading fashion, and so is grouped with the former set.

careful consideration of what Justice Stewart was dissenting against and what he accepted would seemingly need to delve into those factual distinctions. While it is perhaps unsurprising that casebook authors do not choose to spend the space necessary to delve into this, at the same time it is notable that they uniformly do not.

Generally speaking, the flaw in the casebook coverage comes from an effort at editing down the case such that Justice Stewart's dissent (filed in *Lucas* but also applying to *WMCA*) can be contrasted with the majority opinion in *Reynolds*. While it is true that the logic Justice Stewart used in his dissent sparred with the majority's logic in *Reynolds*, the simple fact of the matter is that *he did not dissent in Reynolds!* This has the potential to lead to confusion, or at least a failure to recognize the real meaning of Justice Stewart's "third way" approach.

For example, in one casebook, the introduction to the section on vote dilution and *Reynolds* notes that "[*Reynolds*] arose from a challenge to the malapportionment of the Alabama legislature. The challengers claimed that the existing districting scheme, based on the 1900 census, discriminated against voters in counties whose populations had grown proportionately far more than others since the 1900 census."<sup>84</sup> A brief bracketed comment after the majority opinion notes that "the Court relied on [*Reynolds*'] principles to invalidate apportionment schemes"<sup>85</sup> in several other States, and that *Lucas* "warrants special mention . . . because it had been approved by the voters of the state by a statewide referendum. Moreover, the voters had rejected a plan to apportion both houses on the basis of population."<sup>86</sup> The excerpt contains a single paragraph of Stewart's dissent, noting that it was "in the Colorado and New York cases."<sup>87</sup>

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<sup>84</sup> SULLIVAN ET AL., *supra* note 80, at 643.

<sup>85</sup> *Id.* at 645.

<sup>86</sup> *Id.* at 645–46.

<sup>87</sup> *Id.* at 647.

While the preceding discussion by now hopefully makes one conversant with what was actually happening in this series of votes and decisions, is there any doubt that a law student would fail to understand what was going on? The text offers no indication of *why* Stewart was dissenting only in New York and Colorado, and Stewart specifically did *not* dissent against striking down the Alabama districting scheme based on the census of 1900! It is impossible to understand the true meaning of Justice Stewart's assertion that an apportionment plan ought to achieve "effective and balanced representation of all substantial interests" without *some* consideration of the facts that distinguish the cases.

Stewart's position is possibly cast in an even worse light in the Choper casebook. There, *Reynolds* is preceded with a note that recounts the various statistical wrongs that the "permanent provisional" apportionment of the Alabama Constitution foisted upon Alabamans.<sup>88</sup> Nothing, however, notes that *Reynolds* was part of a package of cases decided that day. Although the excerpt of Stewart's opinion notes that he "concurred in the result in *Reynolds*, but . . . dissented in two of the companion cases in an opinion sharply at odds with the *Reynolds* rationale,"<sup>89</sup> it leaves it up to the reader to discover that there were several cases decided that day, with separate majority opinions, and differing facts which produced Stewart's differing votes.

Perhaps the most mixed treatment of these cases is in the Stone text. The introduction to the majority opinion makes it clear that there were six cases and States, but also quotes the majority as saying Alabama, with "no reapportionment of seats in the Alabama Legislature for over 60 years," was "signally illustrative and symptomatic of the seriousness of this problem [of

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<sup>88</sup> CHOPER ET AL., *supra* note 80, at 1369 ("Although the Alabama constitution required the legislature to reapportion decennially on the basis of population, none had taken place since 1901. . . . [Under] 1960 census figures, only 25.1% of the State's total population resided in districts represented by a majority of the members of the Senate, and only 25.7% lived in counties which could elect a majority of the members of the House of Representatives. Population-variance ratios of up to about 41-to-1 existed in the Senate, and up to about 16-to-1 in the House.").

<sup>89</sup> *Id.* at 1372.

malapportionment] in a number of States.”<sup>90</sup> If this were the reader’s last exposure to these matters, they might conclude that all six States had basically refused to reapportion according to their own constitutions to preserve a status quo. However, the end of the excerpt from Justice Stewart’s opinion *does* note that he voted to uphold the Colorado and New York apportionments because Colorado’s was “adopted in a statewide referendum and because it accommodated the distinct interests and characteristics of the state’s various regions,”<sup>91</sup> while the New York apportionment was acceptable because it “assured smaller counties greater representation in the Assembly than would be warranted under a population-based apportionment and limited representation of the largest counties . . . [which] was justified as a counterweight to New York City’s ‘concentration of population, homogeneity of interest, and political cohesiveness.’”<sup>92</sup>

A similarly novel approach to dealing with these cases is in the Chemerinsky text. There, Chemerinsky includes *Reynolds* as a principal case and thus excerpts at a few pages’ length the majority opinion.<sup>93</sup> He also includes Justice Harlan’s dissent, which dissented equally to all six of the reapportionment cases.<sup>94</sup> However, he does not include anything at all from Justice Stewart’s dissent, and thus there is no opportunity for a mischaracterization of Justice Stewart’s position. This is both good and bad: while Justice Stewart’s position is thus not mis-represented, arguably this arrangement misses an opportunity for a “teachable moment” to instruct students on the range of options that were available to the Court at the time it decided these cases. However, given the constraints of a survey course on constitutional law, it is arguable (and,

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<sup>90</sup> STONE ET AL., *supra* note 80, at 782.

<sup>91</sup> *Id.* at 785.

<sup>92</sup> *Id.* at 786.

<sup>93</sup> CHEMERINSKY, *supra* note 80, at 953–56

<sup>94</sup> *Id.* at 956–57.

given his pedigree, unsurprising) that Chemerinsky gives both the most complete and least misleading account of the reapportionment cases by simply omitting Stewart entirely.

As noted earlier, this discussion does not purport to be a substantive evaluation of whether *Reynolds* ought to be taught and, if so, how it should be taught. That said, the diversity of approaches to the case indicate that, in the opinion of at least some casebook authors, it is a sufficiently significant piece of case law that it ought to be included as a principal case that students should spend some time reflecting on (as opposed to simply introducing them to the case's equipopulation rule). And yet, as this discussion should indicate, Justice Stewart's position in *Reynolds* was nuanced and subtle; his dissent, which is often printed opposite the majority opinion in *Reynolds*, did not even apply to *Reynolds*. Although Justice Stewart's "third way" position in *Reynolds* may be difficult to teach, it is notable that in some other circumstances, similarly subtle "third way" distinctions are, if not emphasized, at least not glossed over.<sup>95</sup> At any rate, it is possible that greater emphasis on Stewart's alternative approach could drive interest in this area of constitutional law for a new generation of lawyers.

## V. *Conclusions*

Apportionment and districting schemes are an important way in which a society expresses how it wants to look. "The apportionment of seats in a legislature is the apportionment of power within the community. Any scheme of legislative apportionment represents choices regarding how much power shall be allocated to the diverse interests within the society."<sup>96</sup> A

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<sup>95</sup> See, e.g., COHEN, *supra* note 80, at 107–110, 111–112 (excerpting from *Nixon v. United States*, 506 U.S. 224 (1993), Justice Rehnquist's majority opinion holding that the issue of the sufficiency of a Senate impeachment trial of a U.S. District Court judge was nonjusticiable; Justice White's opinion, concurring in the judgment, that it *was* justiciable, and Justice Souter's "third way" approach that *normally* it would be nonjusticiable but that "[o]ne can, nevertheless, envision different and unusual circumstances that might justify a more searching review of impeachment proceedings").

<sup>96</sup> RICHARD C. CORTNER, *THE APPORTIONMENT CASES* 3 (1970).

natural place for that fundamental matter to be expressed is in a Constitution, and, at the federal level, there is relatively widespread devotion to the Constitution in some intangible way.

Yet “State constitutions generally receive little attention in most American law schools, or in American life generally.”<sup>97</sup> Perhaps this is because the Court has disallowed it; if “[t]he theory of equal population apportionment . . . competed with other theories that rejected population as the only legitimate basis of representation,”<sup>98</sup> and the Court simply undid the political compromises that the various State Constitutions in the reapportionment cases represented, why bother paying attention? Indeed, if “one c[an] see little of value left in a state constitution that could not be handled in statutory law,”<sup>99</sup> it is quite rational that the average voter cares not for his or her State Constitution, or local units of government; much of what makes them worth being interested in has washed away. It seems likely that, if the ramifications of the reapportionment cases had been framed in exactly this way, most people would have at least asked for more time to think it over carefully before making a decision, instead of glibly throwing out years of careful deliberation and political haggling.<sup>100</sup> Perhaps Justice Stewart’s

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<sup>97</sup> RICHARD BRIFFAULT & LAURIE REYNOLDS, *CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW* 47 (6th ed. 2004) (citing U.S. ADVISORY COMM’N ON INTERGOVERNMENTAL RELATIONS, *STATE CONSTITUTIONS IN THE FEDERAL SYSTEM* 7 (1989) for the proposition that “only 44% of Americans know that their state has its own constitution”).

<sup>98</sup> CORTNER, *supra* note 95, at 4.

<sup>99</sup> See GRAHAM, *supra* p. 13.

<sup>100</sup> CORTNER, *supra* note 95, at 3–4 (“The compromise on legislative apportionment in the Philadelphia [Constitutional] convention demonstrated that while the theory of equal population apportionment was supported widely in the United States, its implementation in apportionment systems was subject to being tempered by consideration of other factors as legitimate, and competing, basis of representation—such as representation of political subdivisions and economic interests. Indeed, during the first half of the twentieth century, the number of American state legislatures apportioned on a population basis decreased steadily. With the rise of the city, legislatures became more and more reluctant to accord representation to these new concentrations of population commensurate with their numbers. While failure to reapportion contributed greatly to the decline of equal population representation in state legislatures, further barriers to such equality were imposed in many states by constitutional provisions that recognized factors other than population in determining the bases of representation. A survey of the apportionment provisions of state constitutions in 1955 found that population, without qualification, was the basis of representation in the upper houses of the legislatures of only twenty-two states and the lower houses of only twelve. Most legislative houses were apportioned upon a basis composed of mixed area and population factors.”).



approach would have been the moderate position they would have chosen. Hopefully, future generations of lawyers can be exposed to his quiet, overlooked wisdom.